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Civil Rights

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CIVIL RIGHTS

OVERVIEW

This was a significant survey period for the Tenth Circuit in the area of civil rights. The court examined the controversial issue of immunity under section 1983 of the Civil Rights Act of 1871 for prosecutors and police officers. Also under section 1983, the court decided that forensic patients, like prisoners, have a constitutional right of adequate access to the courts. Under Title VII, the court established a prima facie test for determining discrimination in an academic setting. And, under the Age Discrimination in Employment Act (ADEA), the court found that plaintiffs can collect future damages and applied the Supreme Court test for determining an employer's willfulness in violating the ADEA.

I. SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871

Section 1983[1] places personal liability upon any person who, acting under color of state law, violates constitutional or other federally protected rights of another person. The Tenth Circuit further defined its parameters in the three cases discussed below.

A. *The Absolute Immunity Defense to a Violation of a Constitutional Right:* Rex v. Teeples

Rex v. Teeples[2] examined the threshold question of whether a section 1983 claimant had suffered a violation of his constitutional rights, and whether, in turn, one of the defendants was entitled to the absolute immunity defense afforded to prosecutors.

Randall Rex brought a section 1983 civil rights action against Police Officer John Teeples and Chief Deputy District Attorney Donald Johnson, contending that Teeples violated his constitutional due process rights by having him held under a state mental health statute, and that Teeples and Johnson violated his due process rights by coercing him to confess involuntarily.[3] The district court granted summary judgment for both Teeples and Johnson, concluding that Johnson, as prosecutor, had absolute immunity, and that the mental health hold and allegedly coerced confession did not constitute constitutional violations and were

1. Section 1983 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1982), provides:

> Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. 753 F.2d 840 (10th Cir.), *cert denied*, 106 S. Ct. 332 (1985).

3. *Id.* at 841.

only cognizable under state tort law.[4]

On appeal, the Tenth Circuit reviewed the facts in the light most favorable to Rex, the party opposing summary judgment. Rex was hospitalized after trying to commit suicide by carbon monoxide poisoning. Teeples, a local police officer, suspected Rex of a local kidnapping, questioned him,[5] and directed a doctor to place Rex under a seventy-two hour "mental health hold,"[6] allegedly because he did not yet have probable cause to make an arrest but still wanted to question Rex. After Rex was transferred to a second hospital, District Attorney Johnson advised Rex of his *Miranda* rights.[7] Rex allegedly signed a waiver of those rights and then Teeples, and to a lesser extent, Johnson, interrogated Rex. Rex eventually confessed to the kidnapping. Rex alleged that Teeples and Johnson took advantage of his disorientation caused by the suicide attempt, deceived him into believing that he was not a suspect, and convinced him to talk without his attorney being present.[8] Rex was later charged with attempted murder, second degree kidnapping and third degree sexual assault.[9] Ultimately, he was not convicted of any of these crimes.[10]

The Tenth Circuit had three issues to consider on appeal of the district court's summary judgment for Johnson and Teeples: 1) whether the alleged circumstances surrounding the seventy-two hour hold could support a section 1983 claim of deprivation of liberty without due process; 2) whether the alleged circumstances surrounding Rex's confession could support a section 1983 claim of deprivation of liberty without due process; and, 3) whether District Attorney Johnson's role in obtaining the confession entitled him to absolute immunity from the section 1983 claim. The court answered the first two questions affirmatively, the third negatively and reversed and remanded for fur-

4. *Id.*

5. *Id.* at 844 (Barrett, J., dissenting).

6. Under Colorado law, when a person appears to be mentally ill and appears to present imminent danger to himself or others, a professional person, upon probable cause, may place him in an approved facility for a seventy-two hour treatment and evaluation. COLO. REV. STAT. § 27-10-105(1)(a) (Supp. 1984).

7. 753 F.2d at 841-42. The Colorado Court of Appeals has stated that Teeples did *not* question Rex about the kidnapping until after Rex was under the mental health hold and had been advised of his *Miranda* rights. People v. Rex, 636 P.2d 1282, 1284 (Colo. Ct. App. 1981) (reversing the defendant's conviction for second degree kidnapping). The Colorado Court of Appeals' statement of the facts is probably correct, in light of the fact the Rex did not contend on appeal to the Tenth Circuit that Teeples questioned him before advising him of his *Miranda* rights.

8. 753 F.2d at 842; *see also* People v. Rex, 636 P.2d 1282 (Colo. Ct. App. 1981).

9. 753 F.2d at 842.

10. *Id.* The sexual assault charges were dismissed. Rex was initially convicted of the kidnapping charge, but the Colorado Court of Appeals reversed, holding that Rex's statements to Johnson and Teeples were involuntary and therefore inadmissable. People v. Rex, 636 P.2d 1282, 1284 (Colo. Ct. App. 1981). Rex was then given a third trial in which the involuntary statements were not introduced and he was again convicted of second degree kidnapping. The Colorado Court of Appeals reversed that conviction for reasons not relevant to this discussion. 753 F.2d at 842 (citing People v. Rex, 689 P.2d 669 (Colo. Ct. App. 1984)).

ther proceedings.[11]

1. The Mental Health Hold

A threshold requirement of a section 1983 claim is that there be a deprivation of a constitutional right.[12] The plaintiff must allege that the act was committed under color of state or local law and that it subjected the plaintiff to a "deprivation of any rights, privileges or immunities secured by the Constitution and laws."[13] There is no simple test for determining when a police officer has crossed the constitutional line and violated another's constitutional right. For example, if an officer has made a wrongful arrest with a warrant and with probable cause, courts have generally found that there has been no constitutional deprivation[14] unless the arrest was made maliciously[15] or for an improper purpose.[16] Also, no constitutional deprivation has been found when only the "slightest interference" with a personal liberty has been committed.[17]

The Tenth Circuit, Judge Seymour writing for the majority, adapted the "improper purpose" rationale previously used to assess arrests made by police officers, to the facts surrounding the seventy-two hour mental health hold.[18] The court noted that if Teeples had placed Rex under the mental health hold without the probable cause required by the state mental health statute,[19] for the improper purpose of questioning him about the kidnapping, Rex would have suffered a denial of his liberty without due process sufficient to support his section 1983 claim. The propriety of the mental health hold had not been addressed by the

11. 753 F.2d at 842-44.

12. *See, e.g.*, McKay v. Hammock, 730 F.2d 1367, 1371 (10th Cir. 1984). The rights protected by section 1983 include all the rights protected by the fourteenth amendment, such as those rights which are protected by the due process, privileges and immunities, and equal protection clauses thereof. Annot., 1 A.L.R. Fed. 519, 524 (1969).

13. 42 U.S.C. § 1983 (1982). *See supra* note 1.

14. *E.g.*, Baker v. McCollan, 443 U.S. 137, 145 (1979) (The Supreme Court held that the plaintiff, falsely held by the police, had only a cause of action under state tort law, not section 1983, because the police arrested the plaintiff with probable cause and under a valid arrest warrant. Justice Rehnquist wrote for the Court: "The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished without due process of law."); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977).

15. *E.g.*, Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979) (stroke victim arrested and put in drunk tank).

16. Lessman v. McCormick, 591 F.2d 605, 609-11 (10th Cir. 1979) (woman arrested for non-payment of traffic tickets, brought to police station and forced to meet with bank employee about her non-payment of a loan); *see also* Sartin v. Commissioner, 535 F.2d 430, 434 (8th Cir. 1976) (black man married to a white woman arrested without probable cause by police for drunken driving).

17. Atkins v. Lanning, 556 F.2d 485, 489 (10th Cir. 1977); *see also* Wise v. Bravo, 666 F.2d 1128, 1133 (9th Cir. 1981).

18. 753 F.2d at 843.

19. *See supra* note 6. The Tenth Circuit considered the mental health hold a possible deprivation of the right to liberty without due process, under the fifth and fourteenth amendments, instead of a violation of the fourth amendment right to be free from illegal arrests without probable cause or a warrant. Therefore, the "probable cause" of which the court speaks is the probable cause under the Colorado mental health statute that a person will be a danger to himself or others, rather than the probable cause necessary for a valid arrest.

district court and there were no affidavits from either the doctor or Teeples explaining why Rex was held. Hence, the Tenth Circuit ruled that there were definite issues of fact making summary judgment on this issue inappropriate.[20]

2. The Allegedly Involuntary Confession

The court likewise concluded that Rex had stated a constitutional claim arising from the interrogation conducted by Teeples and Johnson and reversed the summary judgment for the defendants on this issue.[21] The court ruled that the transcript of the taped interrogation and the Colorado Court of Appeals' ruling, when viewed in a light most favorable to the plaintiff, indicated that there was a factual issue regarding whether Rex's statements had been made voluntarily. The court observed that extracting an involuntary confession by psychological coercion has been held to be a due process violation in other courts and is, therefore, actionable under section 1983.[22] Judge Barrett dissented, arguing that although Officer Teeples may have participated in the interrogation of Rex, those actions had not "caused" a deprivation of Rex's constitutional rights.[23] He noted that Teeples had not introduced the confession at Rex's trial, had not made the decision that it be introduced, and had only taken the confession after being told that Rex had been advised of his *Miranda* rights. Judge Barrett thus used the traditional tort analysis of proximate cause, whereby a defendant may be excused from liability if the actions of another defendant are an intervening cause of the plaintiff's injuries.[24] In this case, the prosecutor at Rex's kidnapping trial and the trial judge acted as intervening parties to Teeples' liability, Judge Barrett claimed.

Tort law analysis is often used by courts in civil rights cases.[25] However, using the tort law analysis of proximate cause as a defense to a

20. 753 F.2d at 842-43. Judge Barrett dissented on this issue because he felt that it was beyond dispute that Rex appeared dangerous to himself following his attempted suicide, rendering Teeples' conduct within the authority created by the mental health statute. *Id.* at 845 (Barrett, J. dissenting).

21. 753 F.2d at 843.

22. *Id.* (citing Duncan v. Nelson, 466 F.2d 939, 944-45 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972); Spano v. New York, 360 U.S. 315, 323 (1959)). It is interesting to note that Rex could have asserted offensive collateral estoppel on the issue of whether his confession was involuntary. The Supreme Court has held, in Allen v. McCurry, 449 U.S. 90 (1980), that decisions of state courts on federal constitutional claims raised in state criminal proceedings may be asserted as collateral estoppel in section 1983 actions. Collateral estoppel would have prevented relitigation of whether Teeples and Johnson extracted an involuntary confession from Rex, thereby violating his constitutional rights. *See, e.g.*, Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983).

23. 753 F.2d at 846 (Barrett, J. dissenting).

24. *See* W. KEETON, PROSSER AND KEETON ON TORTS 301 (1984).

25. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1960) (the Supreme Court holding that section 1983 "should be read against the background of tort liability"), *overruled on other grounds*, Monell v. Department of Social Serv., 436 U.S. 658 (1978); Duncan v. Nelson, 466 F.2d 939, 942-43 (7th Cir.) (proximate cause analysis used to determine defendant's liability); *cert. denied*, 404 U.S. 894 (1972); Soto v. City of Sacramento, 567 F. Supp. 662, 688 (E.D. Cal. 1983); Jackson v. Dillion, 518 F. Supp. 618, 622 (E.D.N.Y. 1981). *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 83-86 (1979).

constitutional violation does not follow the spirit, or the letter, of section 1983. Section 1983 provides a civil action to protect persons against misuse of state power;[26] it is often used where there is no adequate state remedy.[27] Section 1983 is intended to provide a remedy for violations of constitutional rights, those rights which are accorded the highest value in our society. On the other hand, proximate cause analysis is derived from traditional tort law which protects rights of a presumably lower value. A state may, by statute, abolish recovery for tort injuries but may not do the same to recovery for violation of constitutional rights. One who wrongfully sets in motion the violation of an individual's constitutional rights should bear a higher degree of responsibility than that person should if a tort, not cognizable under the civil rights laws, is ultimately committed against an individual. Proximate cause analysis serves to equate the responsibility that one bears for causing a violation of a constitutional right with causing a tort. Therefore, proximate cause analysis can, under some circumstances, serve to cut off liability earlier than is appropriate given the status of constitutional rights in our society.[28] Furthermore, a proximate cause analysis cannot be justified as a way to prevent police officers from bearing the brunt of liability because of prosecutors' and judges' absolute immunity from suit;[29] police officers, too, can assert a qualified immunity to protect themselves from this liability.[30]

3. Absolute Prosecutorial Immunity

The Tenth Circuit's decision that Rex had asserted a colorable section 1983 claim meant that it then had to decide if District Attorney Johnson was absolutely immune from the claim.[31] The court held that Johnson was not entitled to absolute immunity because his acts against Rex were not part of "initiation and presentation of a prosecution," which is the Supreme Court standard set forth in *Imbler v. Pachtman*.[32]

In *Imbler*, the Supreme Court held that a state prosecuting attorney acting within the scope of his duties in initiating and pursuing a criminal

26. C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 51, at 94 (1980).

27. *See* Annot., 1 A.L.R. Fed. 519, 522 (1969).

28. One commentator writes: "[T]hat law school favorite, proximate cause, occasionally appears to divert attention from the real issue, the existence of Section 1983 liability." S. NAHMOD, *supra* note 25. The author analyzes use of the proximate cause analysis in section 1983 actions, concluding that proximate cause standards from tort law should not determine the extent of liability under section 1983, but instead, the extent of liability should be solely a question of the scope of the constitutional breach. *Id.* at 83-86.

29. *See* Smiddy v. Varney, 665 F.2d 261, 267 (9th Cir. 1981) (police officer not liable after district attorney files charges because prosecutor presumably exercises independent judgment in determining if probable cause existed), *cert. denied*, 459 U.S. 829 (1982).

30. Absolute and qualified immunities are discussed *infra*, notes 43-48 and accompanying text.

31. *Rex*, 753 F.2d at 843.

32. 424 U.S. 409 (1976). *See also* Lerwill v. Joslin, 712 F.2d 435, 437 (10th Cir. 1983). Absolute immunity defeats a suit at the outset. *Imbler*, 424 U.S. at 419 n.3. This is as opposed to a qualified immunity, which only protects public officials from liability when they have acted in good faith. Qualified immunity is discussed *infra*, notes 43-48 and accompanying text.

prosecution is immune from a civil suit for damages under section 1983.[33] *Imbler* provides only this narrow holding, however, and gives no guidance as to which of the many functions of a prosecuting attorney are covered by absolute immunity. Lower courts have since held that a prosecutor is not entitled to absolute immunity when he engages in investigatory or administrative functions outside his "quasi-judicial" role.[34] The courts have held that police-related functions are investigative and so are not protected by absolute immunity.[35]

The Tenth Circuit noted that "advocacy" is the determinative factor in deciding which of the prosecutor's functions are covered by absolute immunity, because it is a prosecutor's most "quasi-judicial" function.[36] The court concluded the District Attorney Johnson was not entitled to absolute immunity because "giving *Miranda* warnings to a general suspect and participating in his interrogation is 'police-related' work and [not] quasi-judicial."[37] The court reversed the district court's grant of summary judgment for Johnson.

Judge Barrett, in dissent, argued that investigative and administrative functions pervade a prosecutor's duties and that "slicing," or dividing the functions into categories for determining entitlement to absolute immunity is questionable.[38] Judge Barrett characterized Johnson's interrogation of Rex as being part of an advocate's preparation before deciding whether to initiate an action.[39]

B. *Qualified Immunity:* Bledsoe v. Garcia

In *Bledsoe v. Garcia*,[40] the Tenth Circuit considered the qualified immunity defense asserted by a police officer. The court joined those courts which have held that police officers may claim a qualified immunity to a section 1983 action for using excessive force in making an arrest.[41]

1. Background

Qualified immunity, also known as the good faith defense, protects

33. 424 U.S. at 410, 431.

34. Coleman v. Turpen, 697 F.2d 1341, 1346 (10th Cir. 1982); McSurely v. McClellan, 697 F.2d 309, 318 (D.C. Cir. 1982); Marrero v. City of Hialeah, 625 F.2d 499, 503-05 (5th Cir. 1980). This is called the "functional approach" to the immunity question. *See* Harlow v. Fitzgerald, 457 U.S. 800, 810-11 (1981); Taylor v. Kavanaugh, 640 F.2d 450, 452 (2d Cir. 1981). Courts examine the function rather than the status of the person acting to determine if absolute immunity applies. Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1593 (1984); Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); *see also* Note, *Civil Rights*, 5 AM. J. TRIAL ADVOC. 357 (1981).

35. Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir 1980); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974).

36. 753 F.2d at 843.

37. *Id.* at 844.

38. *Id.* at 845 (Barrett, J., dissenting).

39. *Id.* at 845-46.

40. 742 F.2d 1237 (10th Cir. 1984).

41. *Id.* at 1240.

a public official from liability if he can prove he acted in "good faith."[42] Section 1983 does not expressly establish qualified or absolute immunities under that section.[43] However, the Supreme Court in *Pierson v. Ray*[44] found that Congress did not intend to abolish all common law immunities when it passed section 1983 and held that the good faith defense available to police officers in common law false arrest and imprisonment actions is also available in a section 1983 false arrest and imprisonment action.[45] The Court explained in a later case, *Imbler v. Pachtman*,[46] that it found this immunity to exist by first considering "the immunity historically accorded the official at common law and the interests behind it,"[47] and then by determining "whether the same considerations of public policy that underlie the common law rule likewise countenance . . . immunity under § 1983."[48]

There is some question among the courts as to whether a police officer can also assert a qualified immunity to a section 1983 claim of excessive force in making an arrest.[49] To find an immunity, lower courts have extended the Supreme Court's holding in *Pierson* to this arrest situ-

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42. Qualified immunity originally entailed both subjective and objective elements. The subjective test has been eliminated. Today, officials are not subject to liability under section 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981). *See generally* Note, *Eleventh Annual Tenth Circuit Survey: Civil Rights*, 62 DEN. U. L. REV. 59, 65-66 (1985) (discussing the distinction between the subjective and objective tests, as applied by the Tenth Circuit).

The defendant must prove by a preponderance of the evidence that he acted in good faith. S. NAHMOD, *supra* note 25, at § 8.01.

43. One commentator has even suggested that section 1983 "could be read to impose strict liability on state and local government officials once a constitutional deprivation has been established." Note, *Developments In the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1209 (1977). *See also* Imbler v. Pachtman, 424 U.S. 409, 417 (1975) (Section 1983 "on its face admits of no immunities.").

44. 386 U.S. 547, 554 (1966). *See also* Tenney v. Brandhove, 341 U.S. 367 (1951) (establishing immunity of legislators from section 1983 liability).

45. 386 U.S. at 557. The Court also held that judges have absolute immunity from section 1983 liability. *Id.* at 553.

Justice Douglas' dissent in *Pierson* was highly critical of the absolute judicial immunity holding. He did not discuss the qualified immunity issue, but his clear rejection of absolute immunity seems to imply a concurrent rejection of qualified immunity. *See also* C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 98 (2d ed. 1980) ("There is no acceptable proof that Congress intended to immunize any public servants from liability under § 1983. It is more likely that Congress intended in § 1983 to do away with whatever immunities existed under state laws . . . . Notwithstanding the foregoing, some courts—including the Supreme Court—seem bound to rewrite the Civil Rights Acts so as to exempt certain public servants from the law.").

46. 424 U.S. 409 (1975) (finding absolute immunity for prosecutors).

47. *Id.* at 421.

48. *Id.* at 424. The common law the Court refered to is not the common law of any given state, but rather, as the Court stated in *Pierson*, "the prevailing view of common law in this country." 386 U.S. at 555. *See* Note, *Developments In the Law—§ 1983 and Federalism*. 90 HARV. L. REV. 1133, 1211 n.126 (1977).

49. Excessive force has been defined as that force which is unreasonable and unnecessary under the circumstances and which violates universally accepted standards of decency. Hausman v. Tredinnick, 432 F. Supp. 1160, 1162 (E.D. Pa. 1977). Federal courts have held that a police officer's use of excessive force is actionable under section 1983. *See* Hausman v. Tredinnick, 432 F. Supp. 1160 (E.D. Pa. 1977); Everett v. City of Chester, 391 F. Supp. 26 (E.D. Pa. 1975).

ation.[50] Thus, the Eighth Circuit, in *Landrum v. Moats*,[51] held that two police officers who shot a burglary suspect in the back and killed him used excessive force, but nevertheless were entitled to a "qualified immunity from liability based on [their] good faith belief in the propriety of their actions and reasonable grounds for that belief."[52] The court then set out guidelines for determining good faith:

> If police officers 1) believe that a certain amount of force is necessary to make an arrest, 2) believe that use of that amount of force is lawful under the circumstances, and 3) have reasonable grounds for each of the foregoing beliefs, then they are entitled to the defense of good faith even if the use of force turns out, *ex post*, to have been illegal or excessive.[53]

The court concluded that the absence of a good faith defense at common law to charges of assault and battery was not decisive on the availability of a section 1983 defense to such charges in view of "the policies and purposes of the section 1983 action."[54]

Two federal district courts, however, have held that police officers are not entitled to this good faith defense. One district court, in a decision affirmed *per curium* by the Sixth Circuit,[55] held that there is no good faith defense to the use of excessive force when the cause of action is based upon assault and battery. The court reached this decision by interpreting the immunity found in *Pierson* as applying only to actions for false imprisonment and false arrest.[56] Another district court, in a case involving a deputy sheriff's violence towards a jail inmate, held that the good faith defense is not applicable to an excessive force claim because such force violates constitutional rights and is inherently unreasonable.[57]

2. *Bledsoe v. Garcia*

Defendant Garcia, a police officer, came to the Bledsoe residence to arrest Plaintiff, Betty Bledsoe's son, Larry, for failure to appear and to

50. Samuel v. Busnuck, 423 F. Supp. 99, 101 (D. Md. 1976) (Police have a good faith defense to liability under a section 1983 action for excessive force, even though that force was used to effect an "improvident and misguided arrest.") (citing *Pierson*, 386 U.S. at 557); Richardson v. Snow, 340 F. Supp. 1261 (D. Md. 1972) (defense available to charge of excessive force used to effect an arrest without a warrant) (citing *Pierson*, 386 U.S. at 557).

51. 576 F.2d 1320 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978).

52. *Id.* at 1327.

53. *Id.*

54. *Id.* at 1327-28, n.15.

55. Aldridge v. Mullins, 377 F. Supp. 850 (M.D. Tenn. 1972), *aff'd per curiam*, 474 F.2d 1189 (6th Cir. 1973).

56. 377 F. Supp. at 858-59. In Garner v. Memphis Police Dept., 600 F.2d 52 (6th Cir. 1979), the Sixth Circuit affirmed a district court finding that the defendant police officers could assert a good faith defense because they had acted in good faith reliance upon a state law allowing police officers to kill a fleeing felon. The court did not specifically overrule *Aldridge*, so presumably the Sixth Circuit continues not to recognize the good faith defense when the claim against the police is for assault and battery.

57. Williams v. Thomas, 511 F. Supp. 535, 542 (N.D. Tex. 1981) ("The Court . . . cannot acquiesce in the proposition that excessive force can be immunized from liability merely by a detention officer's sincere conviction that such excessive force represents the best response to a perceived problem of prison discipline.").

investigate Larry's AWOL status.[58] Larry stepped outside the house to talk to Officer Garcia and admitted that he was AWOL. He then asked Garcia if he could tell his mother that he was going to jail.[59] Garcia, upon hearing someone in the house tell Larry that he was "not going anywhere with that son-of-a-bitch," asked two other officers to assist him. When the police officers walked toward the house, Betty Bledsoe blocked the door and told them they could not enter.[60] Garcia arrested her for interfering with the police.[61]

Betty Bledsoe brought a section 1983 action against Officer Garcia, claiming that Garcia had used excessive force in arresting her.[62] The jury found for Garcia.[63] Bledsoe appealed, contending that the trial court erred in instructing the jury that good faith is a defense to a section 1983 claim of excessive force.[64] The Tenth Circuit affirmed.[65]

The Tenth Circuit, Judge Holloway writing, first pointed to the Eighth Circuit's holding in *Landrum* that good faith is a defense to a section 1983 action based on excessive force,[66] setting out *Landrum's* four-part guideline for determining good faith.[67] Then, applying the Supreme Court's criteria set forth in *Imbler*, the court examined the common law immunity accorded police officers making arrests, the interests served by this immunity, and whether such an immunity would be consistent with section 1983's policies and history.[68] To do this, the Tenth Circuit chose to look at the common law of arrest instead of assault and battery. Bledsoe had argued that common law assault and battery was applicable,[69] and to which there is no good faith defense.[70] The court relied on the Restatement (Second) of Torts, which establishes a privilege to use force in making an arrest as long as the force is not in excess of that which "the actor reasonably believes to be necessary."[71] Noting that the underlying policy of the privilege was that police should not be held liable for split-second decisions made when arresting possibly dangerous persons, the court held that the common law privilege of force "provides a sufficient parallel for recognizing in a § 1983 suit a good

58. Bledsoe v. Garcia, 742 F.2d 1237, 1238.

59. *Id.*

60. *Id.*

61. *Id.* Once inside the house, Garcia arrested a neighbor, Gail Wesson, for interfering with the duties of a police officer when she tried to prevent the officers from searching the rooms. *Id.*

62. *Id.* at 1239. Gail Wesson joined Betty Bledsoe in her suit, claiming that Garcia and another officer falsely arrested and imprisoned her. Wesson joined Bledsoe in several other claims. Those claims asserted by Wesson alone were denied by the court. *Id.* at 1242-43 (refuting plaintiffs' claims of erroneous jury instructions).

63. *Id.*

64. *Id.*

65. *Id.* at 1240.

66. *Id.* at 1239.

67. *Id. See supra* text accompanying note 53.

68. 742 F.2d at 1239 (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)).

69. *Id.* at 1239.

70. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 21-34 (1965).

71. RESTATEMENT (SECOND) OF TORTS §§ 118, 132 (1965).

faith defense to a claim of excessive force in making an arrest."[72]

3. Analysis

The Tenth Circuit's holding in *Bledsoe* extends the common law good faith defense to a section 1983 action based on excessive force. The holding seems a logical and natural one, based as it is on the solid ground of common law and the Supreme Court's and other circuits' findings of a qualified immunity for police officers. However, the holding's implications deserve closer examination.

Officers using excessive force, particularly deadly force, potentially act as " 'prosecutor, jury, judge and executioner,' "[73] clearly in violation of one's due process rights.[74] Excessive force also violates the fourth amendment right against unreasonable search and seizure.[75] Because excessive force is always a violation of constitutional rights and is, by definition, unreasonable and unnecessary, should a police officer escape liability merely by asserting that he acted in good faith? If he can assert this defense, then section 1983's unique purpose and effect are diluted.

Balanced against the above argument is the public's interest in not preventing its police officers from taking action because of fear of liability. Perhaps a middle ground can be reached by allowing police officers only to use force proportionate to the crime for which the arrest is being made. Thus, police officers would then be able to assert the good faith defense only when they used excessive force in arresting a violent felon.[76] This is an imperfect solution, however, because line-drawing then begins between violent and non-violent felons and between felons and misdemeanants, and everything has come full circle: should the police, when arresting someone, be liable under section 1983 for a split-second decision, or should there be a qualified immunity for police officers in this situation? The debate will continue.

C. *Prisoners' Rights: Access To The Courts*

During the survey period, the Tenth Circuit decided two cases on prisoners' right of access to the courts. *Ward v. Kort*[77] is a case of first impression in which the court held that forensic patients have a right of access to the courts, and state provisions of legal assistance in lieu of a law library requires counseling for prisoners through completion of a habeas corpus or civil rights complaint. *Nordgren v. Milliken*,[78] a case decided concurrently with *Ward*, indicates the extent to which the Tenth Circuit is willing to find a right of access to the courts. The court there

72. 742 F.2d at 1240.

73. Comment, *Deadly Force to Arrest: Triggering Constitutional Review*. 11 HARV. CIV. RTS. L. REV. 361, 386 (1976) (quoting Screws v. United States, 325 U.S. 91, 106 (1945)).

74. Aldridge v. Mullins, 377 F. Supp. 850, 859 (M.D. Tenn. 1972), *aff'd*, 474 F.2d 1189 (6th Cir. 1973); C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 131 (2d ed. 1980).

75. *See generally* Comment, *supra* note 73, at 384.

76. Comment, *supra* note 73, at 373 (1976).

77. 762 F.2d 856 (10th Cir. 1985).

78. 762 F.2d 851 (10th Cir. 1985).

held that the right of access does not require assistance beyond the initial pleading stage.

1. The Right of Access to the Courts

The right of access to the courts is protected by the due process clauses of the fifth and fourteenth amendments[79] and "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[80] The Supreme Court has found that prisoners have a constitutional right of access to the courts[81] to bring habeas corpus and civil rights actions.[82] In *Bounds v. Smith*,[83] the Court further held that states must provide prisoners with adequate law libraries or legal assistance to assure this access.[84]

In *Bounds*, the Court found that access must be adequate, effective and meaningful.[85] The Court emphasized that the right of access protects "our most valued rights" because it allows prisoners to file habeas corpus and civil rights petitions.[86] To ensure that courts consider such petitions, the Court held that states must provide prisoners with a law library or legal assistance to research issues of venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief.[87] With current legal information, prisoners might determine "whether a colorable claim exists and what facts are necessary to state a cause of action."[88]

2. *Ward v. Kort*[89]

The plaintiff, Ray Ward, was an indigent forensic patient at Colo-

79. Wolff v. McDonnell, 418 U.S. 539, 579 (1973). The right of access to the courts has also been found to be one of the privileges and immunities accorded citizens under article four and the fourteenth amendment, and as part of the right to petition under the first amendment. Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983). It has also been found to be covered by the equal protection clause. Gilmore v. Lynch, 319 F. Supp. 105, 109 (N.D. Cal. 1970). The Tenth Circuit does not agree that it can be found under the equal protection clause. *See, e.g.*, Nordgren v. Milliken, 762 F.2d 851, 855 n.3 (10th Cir. 1985).

80. Wolff v. McDonnell, 418 U.S. at 579.

81. *Ex parte* Hull, 312 U.S. 546, 549 (1941).

82. Wolff v. McDonnell, 418 U.S. at 579-80.

83. 430 U.S. 817 (1977).

84. *Id.* at 828.

85. *Id.*

86. *Id.* at 827. Both federal and state prisoners can petition for writs of habeas corpus to challenge the fact or duration of their confinement. 28 U.S.C. §§ 2241-2255 (1982). State prisoners can challenge the *conditions* of their confinement by filing a section 1983 civil rights action and alleging that prison officials, acting under color of state law, have deprived the prisoner of constitutional or federal rights. 42 U.S.C. § 1983 (1982).

87. 430 U.S. at 825-26.

88. *Id.*

89. The author would like to express her gratitude to Professor Alfred J. Coco, Professor of Law and Librarianship and Law Librarian at the University of Denver College of Law. Professor Coco represented Plaintiff Ray Ward on appeal and provided the author with background information pertaining to this case.

rado State Hospital (CSH).[90] In 1980, he initiated a section 1983 civil rights action, *pro se*, challenging the conditions of his confinement at CSH. Ward claimed that the CSH superintendent failed to provide adequate access to legal materials, thereby denying him adequate access to the courts.[91] CSH had no law library, the only legal books available being one set of the Colorado Revised Statutes kept in the administration building.[92] The hospital instead had a contract for legal services with a private attorney to provide twelve hours of counselling a week for the patients.[93] The magistrate who heard the case found and stated in his findings of fact that the attorney assisted the patients in obtaining the necessary forms from the United States District Court for civil rights and habeas corpus petitions, helped in drafting the pleadings, and provided research of case law as required.[94] The magistrate recommended dismissal of the case and the district judge affirmed and adopted the magistrate's findings and conclusions and dismissed the action.[95] Ward appealed to the Tenth Circuit.

The Tenth Circuit, Chief Judge Holloway writing for the majority, considered two issues: 1) whether a prisoner's constitutional right of access to the courts, defined by the Supreme Court in *Bounds*, applied to forensic patients at a state hospital; and 2) if so, whether CSH's contracted legal services met *Bounds*' constitutional test of meaningful access.[96]

To resolve the first issue, the court relied on a Seventh Circuit case, *Johnson by Johnson v. Brelje*,[97] that is directly on point. That court held that defendants under criminal charges who are committed to a mental facility because they are found unfit to stand trial have a constitutional right of access to the courts.[98] The Tenth Circuit agreed with the *Johnson by Johnson* court that forensic patients are not on a "lower plane" than prisoners and held that they, too, are entitled to a constitutional right of access to the courts.[99] The Tenth Circuit then considered whether CSH had afforded adequate access to the courts for its patients.

After reviewing the record, the Tenth Circuit held that the legal services at CSH were constitutionally infirm because the contract attorney was not knowledgeable about civil rights law, did not prepare habeas corpus and civil right complaints for the patients or give them guidance in completing these complaints, and did not research any issues such as those set forth in *Bounds*: " 'jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and

90. 762 F.2d 856, 856-57 (10th Cir. 1985). Ward had been confined to CSH since 1969 when he was found not guilty of a criminal offense by reason of insanity. *Id.* at 857.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 858.
97. 701 F.2d 1201 (7th Cir. 1983).
98. *Id.* at 1207.
99. *Ward*, 762 F.2d at 858.

types of relief available.' "[100] Instead, he merely advised patients that they could get forms from the federal district court for civil rights actions, and so, the court found, did not provide adequate legal counsel.[101] The court concluded that the magistrate's findings, which were subsequently adopted by the district court, that the contract attorney adequately assisted hospital inmates through the completion of federal habeas corpus or civil rights complaints, were not supported by substantial evidence and were clearly erroneous.[102]

Using the *Bounds* "touchstone" of adequate, effective, and meaningful access,[103] the Tenth Circuit then held that if a state elects to employ contract attorneys rather than provide an adequate law library, the attorneys must counsel the prisoners or forensic patients through the completion of a federal habeas corpus or civil rights complaint, including "necessary research and consideration of the facts and the law."[104]

Dissenting, Judge Barrett argued that the CSH legal services contract satisfied *Bounds* because inmates need only minimal assistance to file habeas corpus or civil rights forms[105] and have no more right to an attorney who is an expert in civil rights than does anyone else.[106] Any other interpretation of *Bounds*, he wrote, would mean a requirement of "legal representation" in civil litigation.[107] Judge Barrett further pointed out the expense entailed in providing law libraries and legal services not only to prisons but also to mental hospitals treating forensic patients.[108] Finally, Judge Barrett argued that prisoners must expect to live under restrictive and harsh conditions as part of their penalty.[109]

Ward, even more than *Bounds*, affirms the states' obligation to assure all prisoners of their constitutional right of access to the courts. *Bounds* requires states to assist prisoners in the filing of habeas corpus and civil rights petitions. *Ward* clarifies this by requiring assistance through the completion of the complaint. Furthermore, *Ward* extends this right of access to forensic patients in mental hospitals.

The Tenth Circuit did not hold, however, that prisoners and forensic patients have a right to representation by counsel in habeas corpus or civil rights trial proceedings.[110] Nevertheless, the court made it clear

100. *Id.* at 860 (quoting *Bounds*, 430 U.S. at 825).
101. 762 F.2d at 859-61.
102. *Id.* at 860.
103. " 'Meaningful access' to the courts is the touchstone." *Bounds*, 430 U.S. at 823.
104. 762 F.2d at 860-61.
105. *Id.* at 861 (Barrett, J. dissenting). This argument is belied by an earlier Tenth Circuit case, Bradenburg v. Beaman, 632 F.2d 120 (10th Cir. 1980), *cert. denied*, 450 U.S. 984 (1981). The court there held that the trial court had not erred in refusing to entertain a prisoner's habeas corpus and civil rights complaint when the prisoner failed to show evidence of exhaustion of state remedies and used the wrong jurisdictional basis. *Id.* at 122. *See also* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979) (concluding that *pro se* plaintiffs have very little chance of succeeding in section 1983 actions).
106. 762 F.2d at 861 (Barrett, J. dissenting).
107. *Id.*
108. *Id.*
109. *Id.* at 862 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).
110. *Ward*, 762 F.2d at 860.

that providing prisoners access to the courts must be more than a symbolic gesture; prisoners and forensic patients must be able to file correct, complete petitions so that a prisoner with a valid complaint can bring it to the courts and not be in danger of losing the protection of "our most valued rights."[111]

Are states, however, required to assist prisoners in the filing of all civil actions? Furthermore, are states required to give any legal assistance to prisoners beyond the initial pleading stage? Another case decided by the Tenth Circuit during the survey period, *Nordgren v. Milliken*,[112] addressed these questions and the Tenth Circuit answered both in the negative.

3. *Nordgren v. Milliken*

In *Nordgren*, the plaintiffs, indigent prisoners at the Utah State Prison, brought a section 1983 action claiming that they were denied access to the courts because of an allegedly inadequate prison law library and inadequate legal assistance.[113] The underlying causes of action for which the plaintiffs were alleging a denial of access included defense of a paternity suit, modification of a divorce decree, an action for unlawful conversion of a plaintiff's guns, and civil rights claims against the prison staff.[114] The magistrate in his report found that the state provided only minimal law library facilities at the prison but had provided services of contracted attorneys who helped prisoners prepare and file initial *pro se* pleadings in all civil matters.[115] Therefore, the magistrate concluded, because there is no constitutional right to the assistance of counsel for prison inmates beyond the pleading stage, the prison had provided constitutionally adequate services.[116] The district court adopted the magistrate's report and granted summary judgment for the defendant prison officials.[117]

On appeal, the prisoners contended that meaningful access to the courts includes the provision of legal assistance at all stages of trial proceedings, not just the initial pleading stage, and for all types of civil cases, not just habeas corpus and civil rights cases.[118]

Surveying Supreme Court and appellate court holdings, the Tenth Circuit concluded that the right of access to the courts does not require assistance to inmates beyond the completion of a habeas corpus or civil

111. *Bounds*, 430 U.S. at 827. *See supra* note 86 and accompanying text.
112. 762 F.2d 851 (10th Cir. 1985).
113. *Id.* at 851-52.
114. *Id.*
115. *Id.* at 852 & n.2.
116. *Id.* at 852.
117. *Id.* at 852-53.
118. *Id.* at 853. The prisoners also contended that the prison must provide legal assistance without the prison officials' prior determination that the inmates have meritorious claims. The Tenth Circuit found that the attorneys were only determining which complaints were appropriate for court-appointed counsel or private counsel, and that this did not infringe upon the right of access to the courts. *Id.* at 855 n.4.

rights complaint.[119] The court noted that Utah had already made a substantial effort to assist inmates by providing a library and legal assistance and explained that it could not require more assistance of the state because of the burden that would be imposed.[120]

In a footnote, the court determined that the prisoners' second contention — that a law library or legal assistance must be available for all kinds of civil cases — had no factual basis because the state's contract with the law firm provided for legal assistance in all civil matters, not merely federal habeas corpus or civil rights actions.[121] However, the court then reiterated its holding in *Ward* that prisoners are only entitled to legal assistance through the completion of habeas corpus or civil rights complaints,[122] which seems to suggest that the state's legal services contract provided assistance beyond that which is constitutionally required.

4. Analysis

In *Ward*, the Tenth Circuit held that prisoners must be assured of adequate aid in filing habeas corpus and civil rights actions in order that their rights be protected. Although Judge Barrett's dissenting argument in *Ward* — that prisoners have no more right than anyone else to an attorney expert in civil rights — misses the majority's point, it is well taken as applied to the facts of *Nordgren*. In *Nordgren*, the plaintiffs wanted legal assistance in filing divorce and paternity actions. The Tenth Circuit apparently agreed with Judge Barrett's argument in *Ward* and held that prisoners do not have a right to legal assistance in all civil actions.[123]

The court broke no new ground in addressing Nordgren's second issue. The prisoners had argued that legal assistance only through the filing of initial pleadings did not afford adequate access to the courts. Stating as much in *Bounds*, the Supreme Court said:

> [I]f the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.[124]

Of course, the Court was referring to the filing of initial pleadings, but the State may make motions throughout habeas corpus or civil rights proceedings, and without a law library or legal assistance, a prisoner cannot effectively make "an adversary presentation." However, the Tenth Circuit balanced the prisoners' interests against a state's burden

119. *Id.* at 853-55.
120. *Id.* at 855.
121. *Id.* at 855 n.4.
122. *Id.*
123. *Id.* at 855 n.4 (dictum).
124. *Bounds*, 430 U.S. at 826.

in providing more legal assistance and concluded that the right of access did not include assistance beyond the initial pleading stage. Thus, it remains to be seen what future courts will hold is necessary to guarantee access and where they will next draw the line.

II. EMPLOYMENT DISCRIMINATION IN AN ACADEMIC SETTING UNDER TITLE VII: *CARLILE V. SOUTH ROUTT SCHOOL DISTRICT*

A. *Background*

Title VII prohibits employers from discriminating in employment on the basis of sex.[125] The courts have developed two theories of Title VII liability: disparate impact and disparate treatment. A disparate impact claim is appropriate when an employment practice discriminates against all members of a protected class.[126] A disparate treatment claim, on the other hand, lies when the employer has intentionally discriminated against a particular member of a protected class.[127]

In the leading Title VII disparate treatment case, *McDonnell Douglas Corp. V. Green*,[128] the Supreme Court held that a plaintiff must initially establish a prima facie case of discrimination by showing:

> i) that he belongs to a racial minority; ii) that he applied and was qualified for a job for which the employer was seeking applicants; iii) that, despite his qualifications, he was rejected; and iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.[129]

Once this four-prong test is met, the burden shifts to the employer to "articulate some legitimate, non-discriminatory reason for the employee's rejection."[130] If the employer does give a satisfactory reason, the burden shifts back to the plaintiff to show that the employer's legitimate and non-discriminatory reason is a mere pretext for unlawful discrimination.[131]

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125. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)). Section 2000e-2(a)(1) states:

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Congress amended Title VII in 1972 to remove secular educational facilities from Title VII's original exemption. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1 (1972)).

126. Cohen, *Sex Discrimination in Academic Employment: Judicial Deference and a Stricter Standard*, 36 LAB. L.J. 67, 68 (1985). Protected classes under Title VII are distinguished by race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2.

127. Cohen, *supra* note 126, at 68.

128. 411 U.S. 792 (1973).

129. *Id.* at 802.

130. *Id.*

131. *Id.* at 804. In a later case, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), in which the Supreme Court clarified the McDonnell Douglas allocation of burdens and presentation of proof, the Court stated that a plaintiff shows pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explaination is unworthy of credence." *Id.* at 256.

Courts have adapted the *McDonnell Douglas* prima facie test to different fact situations.[132] In *Smith v. University of North Carolina*,[133] a female assistant professor of religion at the university raised a Title VII claim that the university had discriminatorily refused to reappoint or promote her.[134] The Fourth Circuit found it necessary to adapt the *McDonnell Douglas* test to a university setting. The *Smith* prima facie test of discrimination requires:

> 1) That the plaintiff belonged to a disadvantaged class or to a racial or religious minority; 2) That the plaintiff sought and was qualified for reappointment or promotion; 3) That the plaintiff was not reappointed or promoted; and 4) That, in the case of reappointment, the college sought applicants to fill the position from persons of plaintiff's qualifications; or in the case of promotion, the employer had promoted other persons possessing similar qualifications at approximately the same time.[135]

The Ninth Circuit, in *Lynn v. Regents of the University of California*,[136] has adopted the Fourth Circuit's adaptation of the *McDonnell Douglas* prima facie test.

B. Carlile v. South Routt School District

This survey term, the Tenth Circuit also established a prima facie test for employment discrimination in an academic setting. The case, *Carlile v. South Routt School District*,[137] involved a Title VII claim of sex discrimination based upon refusal of a school board to renew the employment contract of a female high school teacher, Nettie Carlile, and grant her tenure. The facts of *Carlile* are significantly distinguishable from other academic discrimination cases. The Tenth Circuit chose to ignore this, however, thus making its decision of questionable value to future courts deciding similar cases.

Carlile taught English and history at a public high school in rural Colorado.[138] After consistently receiving good and excellent evaluations from the principal for two and one-half years of teaching, Carlile suddenly received a poor teaching evaluation from an acting principal, who also recommended to the district that her contract not be renewed for a fourth year.[139] There had been rumors during the period in which

132. *See* A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 50.22 (1985). In a footnote in *McDonnell Douglas*, the Supreme Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations," thereby allowing courts to adapt the *McDonnell Douglas* prima facie test as they find necessary. 411 U.S. at 802 n.13.

133. 632 F.2d 316 (4th Cir. 1980).

134. *Id.* at 321.

135. *Id.* at 340.

136. 656 F.2d 1337, 1341 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

137. 739 F.2d 1496 (10th Cir. 1984).

138. *Id.* at 1498.

139. Under Colorado state law, a teacher employed for the fourth successive year automatically receives tenure, so the non-renewal of Carlile's contract was the equivalent of a denial of tenure. COLO. REV. STAT. § 22-63-112 (1973 & Cum. Supp. 1980).

Carlile received her negative review that the head coach of the boys' basketball team was intending to resign. The coach did resign one month after the district formally denied renewal of Carlile's contract.[140] The school district then hired a male teacher to teach history and coach the boys' basketball team.[141] Carlile then brought an employment discrimination action against the school district, claiming that the district's failure to renew her contract and grant her tenure was based on gender, in violation of Title VII.[142]

The trial court applied the *Lynn* four-prong prima facie test,[143] and determined that Carlile failed to establish a prima facie case of discriminatory motive underlying her termination.[144] The trial court found that Carlile did not pass the second and fourth prongs of the test. She did not meet the second prong, that of qualifying for the available position, because the school district needed someone who could coach boys' basketball and teach, and she did not meet the fourth prong, the showing that the school district had hired someone with the same qualifications, because the district hired someone with different qualifications, including the ability to coach boys' basketball.[145]

The Tenth Circuit, Judge McKay writing, agreed that the four-prong prima facie test set out in *Lynn* and *Smith* was appropriate in any academic setting, including local public schools as well as universities,[146] and held that the trial court's application of that test had not been clearly erroneous.[147] The court held that the non-renewal of Carlile's contract was tantamount to a denial of tenure. Therefore, the district court was not clearly erroneous in applying the four-prong test, originally designed to apply to a denial of tenure, to the school district's decision not to renew Carlile's contract.[148]

C. *Analysis*

The Tenth Circuit in *Carlile* joins other circuits in adapting the *McDonnell Douglas* prima facie test to the academic setting. However, the court's treatment of *Carlile* as just another case of discrimination in an academic setting provides no answers to the questions raised by the facts of *Carlile*.

The *Smith* and *Lynn* prima facie tests were adapted for the situation where a university professor's academic qualifications are evaluated for a promotion, reappointment, or tenure. The situation in *Carlile* was very different. The only similarity among the cases is that all three arose in

140. 739 F.2d at 1498.
141. *Id.*
142. *Id.*
143. In its opinion, the Tenth Circuit wrongly stated that the trial court applied the *Smith* test. *Id.* at 1500. *See Lynn*, 656 F.2d at 1341.
144. *Carlile*, 739 F.2d at 1499.
145. *Id.* at 1501.
146. *Id.* at 1500.
147. *Id.* at 1501.
148. *Id.*

an academic setting. *Carlile*, as the trial court found,[149] did not involve denial of tenure based on lack of academic qualifications; rather, denial was based on the lack of the suddenly-added qualification of coaching boys' basketball. Carlile could never hope to meet this requirement. This fact distinguishes *Carlile* from *Smith*, *Lynn*, and other academic discrimination cases.[150] The Tenth Circuit does not shed light on the distinction, treating the situation as only a contract renewal and tenure decision.

Perhaps the problem is not the test, but its application. At least one court has determined that a sudden change in qualifications establishes a prima facie case of discrimination.[151] Furthermore, the Supreme Court in *McDonnell Douglas* found that plaintiffs "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for rejection were in fact a cover up for a racially discriminatory decision."[152] McDonnell Douglas had refused to rehire the plaintiff, citing his participation in demonstrations against the company.[153] While the Court found that the company's reasons for not rehiring the plaintiff successfully rebutted the plaintiff's claim of discrimination,[154] it also found that the inquiry did not end there. The plaintiff had to be given an opportunity to show that white employees committing equally serious and disruptive acts against the company were "nevertheless retained or rehired."[155] Likewise, the school district's reason for discharging Carlile should merely have rebutted Carlile's prima facie case of discrimination, not defeated her claim of qualification for the job. Carlile should then have had an opportunity to demonstrate that the combination of the teaching and coaching positions was a pretext, by showing that in similar situations male teachers who could not also coach were not discharged. This application of the test is necessary to prevent employers from adding qualifications that not only discriminate against employees but also destroy the employees' chances of establishing a prima facie case to challenge this discrimination. This will be the outcome if the courts have only *Carlile* to rely on when similar situations arise in the future.

149. 739 F.2d at 1499.

150. *But see* Civil Rights Div. v. Amphitheater Unified School Dist., 680 P.2d 517 (Ariz. Ct. App. 1983). *Amphitheater* is possibly the only other case with a fact situation similar to *Carlile*'s. It is a disparate impact case, however. The Arizona Court of Appeals held that the school district's combining of a biology teaching position with a football coaching position had a disparate impact on women.

151. Geisler v. Folsom, 735 F.2d 991, 996-97 (6th Cir. 1984). In *Geisler*, the plaintiff applied for an engineering position and one week later the employer changed the educational requirement for the position. The Sixth Circuit held that this established a prima facie case of discrimination.

152. 411 U.S. 792, 805 (1973).

153. *Id.* at 796.

154. *Id.* at 804.

155. *Id.*

III. THE AGE DISCRIMINATION IN EMPLOYMENT ACT: *EEOC v. PRUDENTIAL FEDERAL SAVINGS*

A. *Background*

The Age Discrimination in Employment Act (ADEA)[156] is the principal source of law on age discrimination. Enacted in 1967, the ADEA makes it unlawful for an employer to discriminate against persons between the ages of forty and seventy because of their age. Administration and enforcement of the act is entrusted to the Equal Employment Opportunity Commission (EEOC).[157]

The only Tenth Circuit case during this survey period that involved the ADEA was *EEOC v. Prudential*.[158] The EEOC claimed that Prudential Federal Savings had violated the ADEA by firing several employees. At trial, the jury found that the termination of one employee violated the act and accordingly awarded him both legal and equitable relief. Both parties appealed to the Supreme Court; it vacated and remanded the Tenth Circuit's original decision to be reconsidered in light of a 1985 Supreme Court decision, *Trans World Airlines v. Thurston*.[159] The Tenth Circuit's subsequent decision is notable because the court held for the first time that future damages are available under the ADEA. The Tenth Circuit also discussed the ADEA conciliation requirement and the appropriate content of jury instructions regarding the plaintiff's burden of proof. Finally, the court adopted the standard set forth in *Thurston* for determining whether or not an employer has willfully violated the ADEA.[160]

B. *The Tenth Circuit Decision on Remand*

1. Conciliation

When a private party files a charge with the EEOC,[161] or when the EEOC itself institutes an action, the EEOC must "promptly notify all persons named in such charge" and "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."[162] This conciliation requirement allows employers to comply voluntarily with the Act before any formal action is filed.[163] Courts regard the conciliation requirement as jurisdictional and may grant summary judgment to the employer if they deem the EEOC's conciliation

156. 29 U.S.C. §§ 621-34 (1982).
157. 29 U.S.C. § 633a (1982).
158. 763 F.2d 1166 (10th Cir.), *cert. denied*, 106 S. Ct. 312 (1985).
159. 105 S. Ct. 613 (1985) (airline's violation of ADEA was not willful according to the standard adopted by the Court).
160. *Prudential*, 763 F.2d at 1174-75.
161. The ADEA allows a private party to file a charge with the EEOC alleging unlawful discrimination. The individual must then wait 60 days before bringing suit. 29 U.S.C. § 626(d) (1982). The party's right to bring a private action terminates if the EEOC commences an action on behalf of the employee. 29 U.S.C. § 626(c)(1) (1982).
162. 29 U.S.C. § 626(d) (1982).
163. Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974).

efforts inadequate.[164] However, many courts prefer to stay the proceedings to allow the EEOC to comply fully with the conciliation requirement.[165]

In *Prudential*, the defendant argued that the EEOC had not satisfied its statutory duty to conciliate.[166] The Tenth Circuit disagreed, holding the the EEOC need only make a limited effort to conciliate to satisfy the Act's minimal jurisdictional requirement. If the EEOC's initial effort is not sufficient, the court held, then the district court can stay the proceedings to allow compliance instead of dismissing the action.[167] Here, the court concluded, the EEOC had sufficiently tried conciliation because it had told Prudential who the charging parties were, what specific misconduct they alleged, and what remedies they sought. The EEOC had also invited conciliation on several occasions.[168]

2. The Instruction on Age as a Determinative Factor

In an ADEA action, the plaintiff has the burden to prove by a preponderance of the evidence that the employer was motivated by the plaintiff's age in discharging or not hiring the plaintiff.[169] However, plaintiffs cannot always find direct evidence of an employer's motivation in making an employment decision. Under Title VII, as discussed earlier,[170] the *McDonnell Douglas* formula allows an inference of discriminatory motive through the use of objective facts when direct evidence is not available.[171]

Courts also apply the *McDonnell Douglas* formula in ADEA cases but disagree on how to apply it.[172] As the First Circuit pointed out in *Loeb v.*

164. 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 102.24(b) (1984) [hereinafter cited as LARSON & LARSON]. *See, e.g.*, Marshall v. Tecumseh Prod. Co., 19 Fair Empl. Prac. Cas. (BNA) 1400 (W.D. Tenn. 1978) (summary judgment proper since conciliation efforts failed to satisfy jurisdictional requirements).

165. LARSON & LARSON, *supra* note 164, at § 102.24(b). *See, e.g.*, Marshall v. Sun Oil Co., 592 F.2d 563, 566 (10th Cir.) (The court held that when further conciliation efforts are required for satisfaction of the jurisdictional requirement, it is proper to grant a stay of proceedings. Summary judgment is inappropriate because it effectively denies access to the courts.), *cert. denied*, 444 U.S. 826 (1979).

166. 763 F.2d at 1168-69. The court basically reaffirmed the principles set forth in *Sun Oil*.

167. *Prudential*, 763 F.2d at 1169.

168. *Id.*

169. Loeb v. Textron, 600 F.2d 1003, 1018 (1st Cir. 1979); 2 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 579 (1980).

170. *See supra* notes 125-55 and accompanying text.

171. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The formula provides that the plaintiff must first establish a prima facie case of discrimination by showing: 1) that he belongs to a minority; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *Id.* The burden of proof then shifts to the employer who is then allowed to offer legitimate reasons for the employee's rejection. *Id.* If the employer's reasons for rejection rebut the plaintiff's prima facie case, the plaintiff is then given the opportunity to show that the employer's reasons for rejection were merely a pretext for discrimination. *Id.* at 804.

172. *See, e.g.*, Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1179 (6th Cir. 1983) (*McDonnell Douglas* does not provide exclusive criteria for establishing a prima facie case); Cuddy

Textron,[173] a leading ADEA case, several problems arise in applying the *McDonnell Douglas* formula to ADEA cases. First, the employer's decision to discharge an employee often results from mixed legal and discriminatory motives.[174] The *McDonnell Douglas* formula does not address this situation.[175] Second, under the ADEA, a plaintiff has an express right to a jury trial.[176] Since the *McDonnell Douglas* formula was created for judge-tried Title VII proceedings, adapting the formula to jury trials may confuse the jurors when they attempt to interpret and apply the formula.[177] Therefore, the First Circuit concluded, in the "mixed motive" situation, courts must instruct the jury that the plaintiff has to prove by a preponderance of the evidence that although several motives may have precipitated his discharge, age was the determinative factor.[178] This is now the predominant rule in the circuits.[179]

Prudential apparently had mixed motives in discharging the plaintiff. Using language from *McDonnell Douglas*, Prudential had requested the trial court to instruct the jury to find for Prudential unless the EEOC proved that Prudential's other reasons for the discharge were merely a *pretext* for discrimination.[180] The Tenth Circuit agreed with the trial court's refusal to so instruct the jury on the grounds that such instructions would confuse the jury into thinking that age had to be the only factor motivating Prudential's discharge.[181] The Tenth Circuit then

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v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982) (court applied a test analogous to *McDonnell Douglas* formula); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982) (court prefers to decide ADEA claims using a case-by-case approach, rather than by adhering to a mechanical application of the *McDonnell Douglas* formula); Jackson v. Sears, Roebuck and Co., 648 F.2d 225, 229-30 (5th Cir. 1981) (court applies *McDonnell Douglas* formula); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 412 (9th Cir. 1981) (same); Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 920 (2d Cir. 1981) (A prima facie case is established when the plaintiff proves he is qualified for the job and it is filled by someone else. These two criteria are derived from the *McDonnell Douglas* formula.); Smith v. University of North Carolina, 632 F.2d 316, 335 (4th Cir. 1980) (The *McDonnell Douglas* formulation is applicable to ADEA cases, but the elements of a prima facie case need not be recited in jury instructions.).

173. 600 F.2d 1003 (1st Cir. 1979).

174. *Id.* at 1019. This combination of legal and discriminatory motives is often referred to as "mixed motives." *Id.*

175. *Id.*

176. 29 U.S.C. § 626(c)(2) (1982); *see also* Lorillard v. Pons, 434 U.S. 575 (1978) (right to jury trial under ADEA).

177. *Loeb*, 600 F.2d at 1016-17; *see also* Schickman, *The Strengths and Weaknesses of the McDonnell Douglas Formula in Jury Actions Under the ADEA*, 32 HASTINGS L.J. 1239, 1258 (1981) ("[T]he extensive *McDonnell Douglas* instruction focuses the jury's attention upon prima facie elements, articulations, and proof of pretext, which loom in importance while the judge speaks. As a result, the basic questions of age as a 'but for' factor may be forgotten.").

178. 600 F.2d at 1019. The court also suggested that the judge should use the *McDonnell Douglas* formula to allocate the burden of proof and organize the evidence, but should not read the formula to the jury. *Id.* at 1016.

179. Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1181 (6th Cir. 1983); Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982); Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196-97 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); Geller v. Markham, 635 F.2d 1027, 1035 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); Loeb v. Textron, 600 F.2d 1003, 1019-20 (1st Cir. 1979).

180. *Prudential*, 763 F.2d at 1170.

181. *Id.*

held that an ADEA plaintiff need not show that age was the sole motivating factor in the employment decision as long as the plaintiff can prove that the age factor made the difference.[182]

3. Future Damages

The ADEA has a two-part remedial scheme. The first part incorporates the remedial provisions of the Fair Labor Standards Act (FLSA).[183] The FLSA provides for recovery of back pay[184] and attorney fees[185] and for recourse to injunctive relief.[186] The second part of the ADEA's remedial scheme includes the power to grant whatever relief is necessary to carry out the purposes of the Act.[187] The first part plainly states that the remedies available to ADEA plaintiffs are those given under FLSA, but the second part provides for unlimited legal or equitable relief. Because of this discrepancy, courts interpreting this section of the ADEA conflict on whether it allows the award of future damages, or "front pay."[188]

In this same section, the ADEA expressly permits reinstatement as a remedy.[189] All circuits now hold that front pay is available when reinstatement is not possible.[190] Some of these circuits have modified the front pay remedy by holding that front pay is available only when the plaintiff has requested reinstatement,[191] whereas other circuits hold that a plaintiff does not waive his right to front pay if he does not request reinstatement.[192]

In *Prudential*, the Tenth Circuit held for the first time that front pay

182. *Id.* The court relied on an earlier decision, Perrell v. FinanceAmerica Corp., 726 F.2d 654, 656 (10th Cir. 1984), which held that the standard of proof necessarily requires the jury to focus on the effect of the plaintiff's age.

183. 29 U.S.C § 201-19 (1982). The ADEA incorporates sections 211(b), 216 (b)-(e) and 217 of the FLSA. 29 U.S.C. § 626(b) (1982). The ADEA further provides that its "provisions . . . shall be enforced in accordance with the powers, remedies, and procedures provided in sections . . . of this title." *Id.*

184. 29 U.S.C. § 216(b) (1982). Back pay equals the difference between salary together with specific monetary benefits which would have vested prior to trial and the value of benefits and earnings from other jobs from discharge to the trial date. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 234-35 (N.D. Ga. 1971).

185. 29 U.S.C. § 216(b) (1982).

186. 29 U.S.C. § 217 (1982).

187. 29 U.S.C. § 626(b) (1982). "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion." *Id.*

188. Front pay is "payment for wages that would have been earned subsequent to trial but for the alleged discrimination." LARSON & LARSON, *supra* note 164, at § 103.44.

189. 29 U.S.C. § 626(b) (1982).

190. Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985); Maxfield v. Sinclair Int'l, 766 F.2d 788 (3d Cir. 1985); O'Donnell v. Georgia Osteopathic Hosp., Inc. 748 F.2d 1543, 1551 (11th Cir. 1984); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-29 (2d Cir. 1984); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100-01 (8th Cir. 1982); Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982).

191. Ventura v. Federal Life Ins. Co., 571 F. Supp. 48, 50 n.2 (N.D. Ill. 1983); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971).

192. Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983).

is an available remedy under the ADEA. It found that the ADEA's grant of power to award "legal and equitable relief as may be appropriate to effectuate the purposes of [the Act]" is "a significant addition"[193] to the remedies available under FLSA, necessary to effect the Act's purpose by compensating a wronged employee and deterring other unlawful discrimination.[194] The court found that although reinstatement is the preferred remedy under the ADEA, courts could award future damages in lieu of reinstatement when reinstatement is not appropriate—for example, when the employer is hostile toward the employee.[195] The court brushed aside any argument that the uncertainty of front pay made it unavailable as a remedy, stating that this reason would only serve to "exonerate a wrongdoer from liability."[196] Citing ways to make front pay less speculative, the court further dispelled the uncertainty argument. Factors to be taken into account include: 1) the employee's duty to mitigate the damages; 2) other employment opportunities available to the employee; 3) the period in which the employee, exercising "reasonable efforts," may become reemployed; 4) the employee's work and life expectancy; and 5) discount tables to figure the present value of future damages.[197] Also, the court noted that front pay was not speculative in this case because it involved a pension that had already vested in the employee.[198] Holding that reinstatement is to be preferred over front pay, the court remanded the case to the trial court to determine why front pay in this instance would be more appropriate than reinstatement.[199]

Judge Barrett dissented as to the award of future damages,[200] agreeing with Chief Judge Seth's dissent in *Blim v. Western Electric Co.*,[201] a case in which the Tenth Circuit assumed, without deciding, that front pay is an available remedy under the ADEA. Judge Seth had acknowledged the ADEA's grant of equitable power to the courts but argued that it could not be used to "expand or override the limited legal remedies available under the ADEA."[202] Looking to the Act's legislative history, Judge Seth concluded in *Blim* that Congress intended to limit the

193. 763 F.2d at 1171.

194. *Id.* at 1171-72 (quoting Koyen v. Consolidated Edison Co., Inc., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983)).

195. 763 F.2d at 1172-73. Reinstatement may be inappropriate because of the employer's animosity, the lack of a comparable job for the employee to re-enter, the employee's rank in the company, or because the employee's job has been taken. Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579, 598-601 (1984) [hereinafter cited as Note, *Front Pay*].

196. 763 F.2d at 1173, (quoting Koyen v. Consolidated Edison Co., 560 F. Supp. at 1169); *see also* J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 566-67 (1981) (courts must be willing to accept uncertainty of damages or the wrongdoer will not be held accountable).

197. 763 F.2d at 1173 (quoting in part *Koyen*, 560 F. Supp. at 1168-69).

198. *See also* Loeb v. Textron, 600 F.2d 1003, 1021 (1st Cir. 1979) (award of pension benefits plainly authorized under ADEA: part of the "amounts owing . . ." in section 626(b)).

199. 763 F.2d at 1173.

200. *Id.* at 1175 (Barrett, J., dissenting).

201. 731 F.2d 1473 (10th Cir. 1984).

202. *Id.* at 1481 (Seth, C.J., dissenting).

Act's legal remedies to "unpaid minimum wages and unpaid overtime compensation" available under the FLSA, meaning "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits," which he claimed did not include front pay.[203]

4. The Instruction on Willfulness

A final issue the court addressed in *Prudential* was the employer's willfulness in violating the ADEA. As discussed earlier, the ADEA incorporates the FLSA's remedial provisions. One of these provides for an award of liquidated damages.[204] Congress provided a good faith exception to FLSA's automatic liquidated damages award through a later act, the Portal-to-Portal Act (PPA),[205] but the ADEA does not expressly incorporate the PPA section. Likewise, the ADEA's legislative history does not disclose any congressional intent that the ADEA incorporate the FLSA's good faith exception.[206] Most courts have held that it does not.[207]

While the liquidated damages award under the FLSA is automatic, under the ADEA it is only payable where there is a "willful" violation of the Act.[208] As the ADEA's legislative history does not define "willful,"[209] courts must interpret the term when awarding damages.

Before the Supreme Court decided *Trans World Airlines v. Thurston*,[210] the circuits were in conflict on what constitutes willfulness and had established four separate tests. The Fifth Circuit developed the most liberal test: "Did the employer know the ADEA was in the picture?"[211] The Tenth Circuit adopted this "in the picture" test and applied it in the earlier *Prudential* opinion, which was subsequently vacated

203. *Id.* (quoting H.R. REP. No. 950, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 535). It has been argued, however, that the ADEA's legislative history indicates that Congress' reason for incorporating FLSA remedies was not to limit remedies under the ADEA, but instead to keep ADEA administration under the Department of Labor instead of creating a new bureaucracy. Note, *Front Pay*, *supra* note 195, at 593-94. *See also* O'Donnell v. Georgia Osteopathic Hosp. Inc. 574 F. Supp. 214, 218-19 (N.D. Ga. 1982). The *O'Donnell* court found that ADEA section 626(b), which provides that "amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation," can logically only be read as authorizing front pay. The court relied on Pavlo v. Stiefel Laboratories, Inc., 22 Fair Empl. Prac. Cas. (BNA) 489, 493-94 (S.D.N.Y. 1979).

204. 29 U.S.C. § 216(b) (1982) is incorporated into the ADEA at 29 U.S.C. § 626(b) (1982). Liquidated damages are an amount equal to the pecuniary loss of wages, salary increases and other employment benefits. Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1164 (S.D.N.Y. 1983).

205. 29 U.S.C. §§ 251-62 (1982).

206. Note, *Liquidated Damages and Statute of Limitations Under the "Willful" Standard of the Fair Labor Standards Act and Age Discrimination In Employment Act: Repercussions of* Trans World Airlines, Inc., v. Thurston, 24 WASHBURN L.J. 516, 529 (1985) [hereinafter cited as, Note, *Liquidated Damages*].

207. Note, *Liquidated Damages*, *supra* note 206, at 529.

208. 29 U.S.C. § 626(b) (1982).

209. Wehr v. Burroughs, 619 F.2d 276, 281-82 (3d Cir. 1980).

210. 105 S. Ct. 613 (1985).

211. Hedrick v. Hercules, Inc., 658 F.2d 1088, 1096 (5th Cir. 1981); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972).

by the Supreme Court.[212] A more stringent test, the "reckless disregard" test, was adopted by the Second, Third and Sixth Circuits.[213] Under this test, a violation was regarded as willful when " 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' "[214] More stringent still was the "knowing" test, adopted by the Fourth, Seventh, and Ninth Circuits,[215] whereby the employer was liable if he acted with knowledge of the Act or knew or should have known that his actions violated the Act. The most stringent test was the "specific intent" test, created by the First Circuit where willfully meant "voluntarily and intentionally, and with specific intent to do something the law forbids."[216]

In *Thurston*, the Supreme Court held that the "reckless disregard" test is the appropriate test.[217] The Court rejected the most liberal test, the "in the picture" test, noting that an employer is required to post ADEA notices and, therefore, would always know of the Act, thereby meeting the willfulness test.[218] The Court also explicitly rejected the most stringent test, the "specific intent" test.[219]

The Supreme Court's position in *Thurston* as to whether the ADEA incorporates the FLSA's good faith exception is unclear. In a footnote, the Court stated that the ADEA did not incorporate section 11 of the PPA (the good faith section).[220] However, elsewhere in the opinion, the Court found that Trans World Airlines did not willfully violate the ADEA because it acted "reasonably and in good faith."[221] Perhaps this means that although the ADEA did not specifically incorporate the good faith exception, courts must consider good faith when determining willfulness.[222] The Tenth Circuit did just that in its subsequent decision in *Prudential*.

In *Prudential*, the trial court had combined the "specific intent" test with the "knowing" test in its jury instructions on willfulness.[223] In its original decision, the Tenth Circuit rejected this test in favor of the lib-

212. *Prudential I*, 741 F.2d 1225, 1233-34 (10th Cir. 1984), *vacated and remanded*, 105 S. Ct. 896 (1985); *see also* Mistretta v. Sandia Corp., 639 F.2d 588, 595 (10th Cir. 1980).

213. Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980); Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1184 (6th Cir. 1983).

214. Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613, 624 (1985) (quoting Air Line Pilots Ass'n v. Trans World Airlines, Inc., 713 F.2d 940, 956 (2d Cir. 1983)).

215. Spangnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1982); Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155-56 (7th Cir. 1981); Kelly v. American Standard, Inc., 640 F.2d 974, 980 (9th Cir. 1981).

216. Loeb v. Textron, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979).

217. 105 S. Ct. at 624.

218. *Id.* at 625.

219. *Id.* at 624 n.19. A test requiring anything more than "reckless disregard" would probably be incorrect. Note, *Liquidated Damages*, *supra* note 206, at 539.

220. 105 S. Ct. at 625 n.22.

221. *Id.* at 626.

222. Note, *Liquidated Damages*, *supra* note 206, at 531.

223. *Prudential II*, 763 F.2d at 1174. The trial court instructed:

> "A willful violation occurs when a person acts with specific intent to violate the law . . . . In other words, you can find . . . willful violation of the law . . . if you find . . . that Prudential knew, or should have known . . . that [its decisions]

eral "in the picture" test.[224] The Supreme Court vacated and remanded the decision to be reconsidered in light of *Thurston*. In its subsequent decision, the Tenth Circuit adopted the "reckless disregard" test.[225] It went on to state that "this standard is elucidated by the Court's holding that a violation is not willful when the employer acts 'reasonably and in good faith.' "[226] The Tenth Circuit concluded that it could not determine as a matter of law whether Prudential had acted in good faith and so remanded the case to the trial court to make this determination.[227]

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were in violation of the law and were intentionally and knowingly done in violation thereof."

Id.

224. *Prudential I*, 741 F.2d 1225, 1233-34 (10th Cir. 1984), *vacated and remanded*, 105 S. Ct. 896 (1985).

225. *Prudential II*, 763 F.2d at 1174.

226. *Id.*

227. *Id.* at 1175.